

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA  
PITTSBURGH**

DAVID E. VUCISH, INDIVIDUALLY,  
AND AS PARENT AND LEGAL  
GUARDIAN; M.D.V., A MINOR; AND  
MICHELLE V. ALBERT,

Plaintiffs,

vs.

JAMES JOSEPH PHILLIPS, JOHN RYAN,  
THE CITY OF JEANNETTE,

Defendants,

2:23-CV-00786-MJH

**OPINION**

This case has been referred to Chief United States Magistrate Judge Richard Lanzillo for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(A) and (B), and Rule 72 of the Local Rules for Magistrate Judges.

On June 4, 2024, Chief Magistrate Judge Richard Lanzillo issued a Report and Recommendation, (ECF No. 37) recommending that Defendants' Motion to Dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(5) for insufficient service of process be granted; and in the alternative, grant in part and deny in part Defendants' Motion to Dismiss under Rule 26(b)(6). (ECF No. 21). The parties were informed that written objections to the Report and Recommendation were due by June 18, 2024. (ECF No. 37). On June 14, 2024, Defendants filed conditional objections, and Plaintiffs filed their response. (ECF Nos. 38 & 41). On June 18, 2024, Plaintiffs filed objections, and Defendants filed their response. (ECF Nos. 39 & 40). For the reasons that follow, after *de novo* review, the Court finds that Plaintiffs' objections do not

undermine the recommendation of the Chief Magistrate Judge. The Court will adopt the Report and Recommendation as the opinion of the Court, as supplemented herein.<sup>1</sup> Defendants' Motion to Dismiss pursuant to F. R. Civ. P. 12(b)(5) will be granted. Defendants' Motion to Dismiss pursuant to F. R. Civ. P. 12(b)(6) will be denied as moot. This case will be dismissed with prejudice.

## **I. Background**

The Chief Magistrate Judge has set forth a detailed and accurate history of the relevant procedural and factual background of the case in his Report, which the Court has reviewed and concludes it need not be repeated herein. (ECF No. 37, at 3-6).

## **II. Discussion**

The filing of timely objections requires the district judge to “make a de novo determination of those portions of the report . . . to which objection is made.” 28 U.S.C. § 636(b)(1); *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989); Fed. R. Civ. P. 72(b)(3). Plaintiffs have filed objections related to the Chief Magistrate Judge's recommendation as to Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(5) and 12(b)(6). Defendants have filed conditional objections to the Chief Magistrate Judge's recommendation related to their Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

### **A. Objections to the Report and Recommendation**

#### **1. The Third Circuit Favors Decision on the Merits**

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<sup>1</sup> Rule 72 of the Federal Rules of Civil Procedure provides in pertinent part: “The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.” Fed. R. Civ. P. 72(b)(3).

Plaintiffs object, arguing that the Chief Magistrate Judge erroneously recommended that the Court grant Defendant's 12(b)(5) Motion, because the Third Circuit prefers to decide cases on the merits, citing *Hritz v. Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984). Defendants point out that the Third Circuit in *Hritz* focused on different circumstances, which do not apply to this case. The Chief Magistrate Judge provided an extensive analysis and his reasoning for recommending that the Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(5) be granted. As indicated in the Report and Recommendation, Plaintiffs filed their Complaint on May 11, 2023, the last day of the statute of limitations for the claims brought. (ECF No. 37, at 13). Plaintiffs then waited to serve Defendants until October 31, 2023, eighty-one days *after* the expiration of the 90-day period for service under Fed. R. Civ. P. 4(m). The Chief Magistrate Judge meticulously applied the applicable tests in making his recommendation that this Court grant Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(5). The Objection is overruled.

## **2. Misinterpretation of Findings of Fact Related to 12(b)(5) Motion**

Plaintiffs object that the Chief Magistrate Judge misrepresented certain facts pled in the Complaint at paragraphs 79, 84, 86, and 89 which "minimize[ed] the egregious, violent, and unlawful nature of the Defendants' conduct" which is a "key factor to be considered when deciding whether a discretionary extension of time for service of the Complaint should be granted to the Plaintiffs." (ECF No. 39-2, at 5). Defendants argue that the Chief Magistrate Judge never characterized the factual allegations at issue as findings of fact. (ECF No. 41, at 5-6). After careful review, the Chief Magistrate Judge does not misrepresent the facts as pled in the Complaint. The Report sufficiently sets forth and discusses the facts and events at issue. Regardless of the facts alleged for the underlying claims, the reasoning within the Report and

Recommendation of the Chief Magistrate Judge fully supports his recommendation that the motion to dismiss be granted. The Plaintiffs failed to timely effectuate service, and the circumstances and undue time delay do not support Plaintiffs' argument for denial of the Motion or for the grant of Plaintiffs' belated plea for extensions. The Objection is overruled.

**3. Plaintiffs' Objections and Defendants' Conditional Objections related to the Chief Magistrate Judge's Recommendations as to Defendants' 12(b)(6) Motion**

Since the Court agrees with and will be adopting the recommendation of the Chief Magistrate Judge related to Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(5), the Plaintiffs' objections and Defendants' conditional objections as to Defendants' Motion to Dismiss pursuant to Fed R. Civ. P. 12(b)(6) are moot.

**III. Conclusion**

The Court accepts the Report and Recommendation, as supplemented herein. Accordingly, the following Order is hereby entered.

**ORDER**

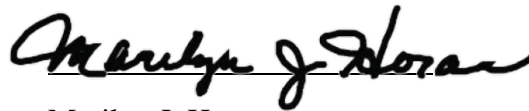
AND NOW, this 31st day of July 2024, it is hereby ORDERED that the Report and Recommendation, (ECF No. 37), dated June 4, 2024, is ADOPTED as the Opinion of this Court, as supplemented herein.

IT IS FURTHER ORDERED that, for the reasons set forth in the Report and Recommendation, as supplemented herein, Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(5) is GRANTED. Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. (12)(b)(6) is DENIED as moot.

IT IS FURTHER ORDERED that the Complaint is DISMISSED with prejudice.

IT IS FURTHER ORDERED that, pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, if any party wishes to appeal from this Order a notice of appeal, as provided in Fed. R. App. P. 3, must be filed with the Clerk of Court, United States District Court, at 700 Grant Street, Room 3110, Pittsburgh, PA 15219, within thirty (30) days.

By the Court:

A handwritten signature in black ink, appearing to read "Marilyn J. Horan", written over a horizontal line.

Marilyn J. Horan

United States District Judge